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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 868/2017 & CM No.28945/2017 (for stay)

POOJA

..... Petitioner

Through: Mr. Prasouk Jain, Adv.

Versus

NARENDER KUMAR SHARMA & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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05.09.2017

1. This order is in continuation of the earlier order dated 16th August, 2017.
2. The counsel for the petitioner has filed documents and has drawn attention to the order dated 2nd May, 2016, in the suit from which this petition arises, on an application under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC). Though the application was under Order I Rule 10 of CPC but from a reading of the order dated 2nd May, 2016, it is clear that the impleadment of the petitioner as defendant in the suit was on the demise of her father and in substitution of her father and not owing to any independent right of the petitioner. Merely because the nomenclature of Order I Rule 10 of CPC has been used would not change the position in law, of the petitioner having come into picture as an heir of her father.

3. What thus transpires is that the application under Order VII Rule 11 of CPC was filed after ten years from the institution of the suit.

4. Be that as it may, the merits of the matter have also been considered.

5. The suit filed by the respondent No.1/plaintiff from which this petition arises, is for recovery of possession of immoveable property and for permanent injunction restraining the defendants from selling, disposing of, transferring, alienating and parting with possession of the said property.

6. The counsel for the petitioner has argued that the plaint is liable to be rejected because the respondent No.1/plaintiff has not sought the relief of declaration of his title to the property. It is argued, that the respondent No.1/plaintiff in the plaint has claimed title to the said property as an heir of his father and on the basis of documents executed in his favour by the other heirs of his father. It is further contended that the petitioner / defendant and the respondent No.2 in this petition who is defendant No.2 in the suit, contested the title of the respondent No.1/plaintiff to the property to be entitled to the relief of possession and permanent injunction and in the light thereof, it was necessary for the respondent No.1/plaintiff to seek the relief of declaration. Reliance is placed on **Anathula Sudhakar Vs. P. Buchi Reddy** MANU/SC/7376/2008 particularly to para 11.3 thereof.

7. The aforesaid contention of the counsel for the petitioner suffers from the basic fallacy that for the purpose of Order VII Rule 11 of CPC, the plaint alone is to be looked into and no other material on record. Thus, the question of looking into the written statement of the defendants, to find out whether the defendants have admitted or disputed the title claimed by the plaintiff in the plaint and to, on the basis thereof, decide whether the plaintiff

was entitled to maintain a suit for possession alone or was also required to seek declaration, does not arise. Supreme Court recently in ***Kuldeep Singh Pathania Vs. Bikram Singh Jaryal*** (2017) 5 SCC 345 has clarified the difference between Order VII Rule 11 and Order XIV Rule 2 of CPC by providing that while under Order VII Rule 11 of CPC, only the plaint and the replication if containing any admissions of the averments in the written statement can be seen, at the stage of decision on preliminary issue, though also on law, all the materials on record can be seen.

8. The reliance placed on ***Anathula Sudhakar*** supra is also misconceived. Supreme Court in that case was concerned with a finding of title to an immoveable property having been returned in a suit for mere injunction and the judgment has to be read in that context only. I may in this regard refer to another recent judgment of the Supreme Court in ***Sundeep Kumar Bafna Vs. State of Maharashtra*** (2014) 16 SCC 623 laying down that with a plethora of orders and judgments emanating from the Supreme Court and all orders and judgments being reported, the Courts have to be careful in applying only the ratio of the judgment and not to misapply the judgments. As far as para 11.3 of ***Anathula Sudhakar*** supra is concerned, what has been observed therein was that where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, in such case, the plaintiff is required to claim declaration. It was further observed that where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessity for the plaintiff to file a suit for declaration, possession and injunction will arise.

9. From the averments in the plaint in the present case, it cannot be said that the title claimed by the respondent No.1/plaintiff is in dispute, for it to be said that it was incumbent upon the respondent No.1/plaintiff to seek the relief of declaration.

10. The counsel for the petitioner has next argued that the respondent no.1 / plaintiff, by not claiming the relief of declaration, has avoided paying the appropriate court fees. It is contended that if the suit was for the relief of declaration-cum-possession, *ad valorem* court fees would have been payable.

11. The aforesaid argument is also in ignorance of law. It is not as if, under Section 7(iv)(c) of the Court Fees Act, 1870, the court fees has to be paid twice over, on declaration as well as for the consequential relief claimed. It has been held in ***M/s Ranchhoddas Shamji Khirani Vs. Balwant Kaur Malik*** AIR 1971 Del 249 (DB), ***Union of India through Chief Commissioner Delhi State Vs. Sir Sobha Singh & Sons (P) Ltd.*** (1969) 5 DLT 464 and ***Mahant Purushottam Das Vs. Har Narain*** AIR 1978 Del 114 that as per the proviso added to Section 7(iv)(c) of the Court Fees Act, in Delhi, the court fees payable on declaration accompanied with consequential relief when relating to an immoveable property, is in terms of Section 7(v) of the Court Fees Act. It shows that the court fees payable would remain the same, whether under Section 7(iv)(c) or under Section 7(v) of the Court Fees Act.

12. The petition is thoroughly misconceived and is dismissed with costs.

13. The counsel for the petitioner at this stage states that it is a *pro bono* matter.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 05, 2017/bs..

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